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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 896.

CHARLES MORENO,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent prays that this court deny the Petition for Writ of Certiorari presented by Petitioner to review the judgment of the Court of Appeals of the Eighth Judicial District of Ohio, which judgment affirmed the judgment of the Court of Common Pleas of Cuyahoga County, Ohio. The Supreme Court of Ohio overruled the Petitioner's Motion to certify the record in this cause.

JURISDICTION.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. A. 1257(3).

ISSUE.

An employee of a Railroad Company intentionally assaulted and injured by a fellow employee has not sustained his burden of proof against his employer under the F. E. L. A. unless he offers evidence that of the time of the assault and injury, the assaulting employee was acting within the scope of his employment and in the furtherance of the work of the employer.

STATUTES INVOLVED.

The trial and appeal below involved the Federal Employers Liability Act, 45 U. S. C. A. 51 et seq.

STATEMENT.

This action arises from an intentional assault and battery committed by a pipefitter upon a sheetmetal worker, both of whom were employed by the New York Central Railroad Company.

Shortly after Petitioner reported for work Nov. 26, 1954, at The Cleveland Union Terminal, he, a sheetmetal worker and his helper were assigned to go to the Linndale shops some several miles away with a truck and to bring office furniture from the Linndale shops to the C. U. T. Upon arriving at Linndale about 8:20 a. m. the Petitioner saw Nezbeth, a pipefitter, about the premises and observed that Nezbeth appeared as if he had been drinking the day before which was Thanksgiving Day. (R. 71-84.)

Nezbeth approached Moreno and asked to use the truck to move certain materials. Moreno consented and

with Nezbeth, Moreno moved the materials with the truck. Nezbeth then returned the truck to Moreno, all without incident. Moreno and his helper resumed their work. (R. 84-85.)

About 10:00 A. M., the pipefitter, Nezbeth, who was engaged in other work about the premises asked Moreno to go with him for coffee. (R. 72.) Moreno declined the invitation, but Moreno's helper, Mr. Long, accepted the invitation of Nezbeth to go for coffee. (R. 72.)

Nezbeth left his work, and the premises of the Railroad Company. Nezbeth drove some distance in a private automobile to a restaurant which served liquor. While in this establishment, Nezbeth consumed 3 or 4 "Boilermakers" (a shot of whiskey and a glass of beer) and a hamburger for lunch. Nezbeth and Long returned to the Railroad shops about 1:00 P. M. (R. 74.)

During the absence of Nezbeth from his work, Moreno continued with his work, ate lunch and awaited the return of the helper who was assigned to drive the truck. (R. 166.)

Prior to the altercation which developed within 5 minutes of Nezbeth return, (R. 157) Moreno and Nezbeth had known each other for years and had a fine relationship. This was renewed subsequent to the altercation. (R. 126.)

Mr. Long and Mr. Nezbeth returned to the Linndale Yard shortly before 1:00 P. M. Mr. Nezbeth appeared to have been drinking. Mr. Moreno and Mr. Nezbeth engaged in a short conversation, at which time, a whistle blew three times. The whistle apparently meant that there was a phone call from the supervisor of both Mr. Nezbeth and Mr. Moreno, Petitioner herein.

Mr. Moreno walked a distance of about 100 yards to answer the telephone, at which time he received from

another Employee a note regarding certain work to be done in the Linndale Yard. Mr. Moreno returned to the place where he had left Mr. Nezbeth, and handed Mr. Nezbeth the note. Mr. Nezbeth apparently thought, at that time, that Mr. Moreno had reported Nezbeth's drinking to their supervisor.

As Mr. Moreno left Mr. Nezbeth after handing Nezbeth the note, Nezbeth followed him toward the truck and without warning, struck Mr. Moreno in the face, knocking him to the ground.

The testimony regarding this occurrence is as follows (R. 91):

"Q. Now, will you tell this Court and jury what happened when they came back?

A. When he came back, the first thing—and this is important testimony in this case—when he came back he faced me there, and he say in a staggering condition what you have to say in regard of that.

The Court: Why you have to say what?

A. What I have to say in regard of that, in his condition that he appeared. I told him there for a moment that he staggering and been drunk, and I say I ain't having nothing to say. I didn't come here to say anything in that.

Then he started and used the most dirty language against me.

I say, 'What I do now, Bob, that you start like that?'

Well, it start at that moment three whistles from the storeroom in the roundhouse blow, one two, three, and these three whistles mean that Mr. Kelley, my foreman, want somebody to come and answer that telephone, he want something. Or either the men in the Linndale shops want to see some of the mechanics in regard of the work.

So when I see that Mr. Nezbeth don't do no move to go and answer this call, I say I believe call,

Mr. Kelly inquire why I don't be back in the Terminal about this time with the first load.

I went and answered the call, that was about far from the shop to the place where that whistle was blowing, about 500 yards, or approximately that.

I went there and the man in the storeroom, he say, 'Charlie, will you please give that to Bob, orders for work to be performed?'

Q. Was this a note that was on the desk?

A. Note that he handed me there.

Q. This was a piece of paper that he handed to you?

A. Piece of paper. I say, all right, was Kelley calling, no. He say they calling here in the storeroom, in the yard, and they want certain things to be done by our forces. That mean the maintenance forces in the Linndale yard, not me.

So I came back, I hand the note to Mr. Nezbeth, and he said, orders there for you to perform certain work there.

He is still keeping insisting there and using the same language, and I say, well, I ain't got nothing to do with that there.

So I thought of it that he was drinking—

Q. I didn't understand you.

A. I told him, the exact swearing and cussing there was in regard I see him drunk, but no in regard of the driving of the truck.

I started from the shop—at that time Mr. Long, Lenny Long, disappeared. Where the truck was I can't tell you how far it was from the premises or where it was parked there.

Our building have a ramp to come there on a ramp from the shop into the ground, and Nezbeth was back of me swearing and using bad language.

Q. Were you still inside the shop at this time or was this outside the shop?

A. He was far from me from inside the shop going to the truck there.

Q. I see.

A. When we get up to the bottom of the ramp, suddenly without any warning, without taking nothing off there, he turn around and gave me such a wallop there, that the results was a broken jaw. But I don't wait for that. Automatically, I run on the ground. I get up. My bottle was thrown out, the things were out of the box, that I have my box in the hand, thrown out on the ground.

I pick it up and I say, 'Bob, what I do to you?' and still I disregard him completely there, pick my things and walked to the truck about from here to then end of this room, and the truck was Mr. Long at the wheel already, ready to go there.

That's the first time I seen the truck since 10 o'clock.

Q. Now, when he struck you, you were walking away from him toward the truck, is that it?

A. Yes.

Q. And he followed you?

A. Yes, and he was back of me and I was facing you and he was in back of me, and suddenly he just grabbed me—

Q. When you say suddenly you are saying suddenly he did this?

A. Suddenly, suddenly. He turned me around and without any warning and without myself having anything there, that if I seen he was going to swing at me perhaps face to face, I will raise my hand and break the blow.

But, of course, I didn't wait there like that. I get the whole impact of his blow right there on my jaw there, and throw on the ground.

Q. He knocked you down, is that it?

A. Knocked me down."

The record shows that Mr. Nezbeth, the assaulter, had no authority over either the Petitioner or the Peti-

tioner's helper. The record is clear that Mr. Nezbeth, the assaulter, had no authority over the truck being used by the Petitioner.

The Petitioner testified (R. 62):

"But the truck most of the time was assigned there to me there to carry different things there from a point to a point, and always Mr. Long in charge of driving under my supervision. I be in charge of the truck and he was in charge of the driving."

And again the Petitioner testified (R. 129):

"Q. Now, you say that on November 26, 1954, when you were in that truck you were with your helper, whose name was Lenny Long?

A. Yes.

Q. And that you supervised Mr. Long?

A. Not supervised Mr. Long, because I don't belong to a supervision in any capacity.

Q. I believe I am quoting from your testimony.

A. No.

Q. I think I wrote it down when you said it. You said that he was your helper and you supervised him in that truck, you were in charge of that truck, did you say that?

A. I might have used the word supervisor. I was in charge of the truck, not supervision of the truck."

The Petitioner further testified (R. 156):

"Q. On November 26, 1954, did Mr. Nezbeth have any authority over you?

A. None whatsoever, that I know.

Q. He could not direct you to do any particular work?

A. No.

Q. Did Mr. Nezbeth on November 26, 1954, have any authority over your helper, Mr. Long?

A. None; none, whatever.

Q. On November 26, 1954, did Mr. Nezbeth con-

trol the activities or the movement of the truck you were using?

A. No."

The conversation which took place between Mr. Nezbeth and the Petitioner upon Nezbeth's return to the Linndale Yard, took place within 5 minutes after he returned.

There is no evidence in the record whatsoever, that previous to the altercation between Mr. Nezbeth and the Petitioner, The New York Central Railroad Company had any previous knowledge of a propensity on the part of Mr. Nezbeth to become belligerant or to drink while at work.

The single question presented to this Court, is whether, under the Federal Employers' Liability Act, the Petitioner has sustained his burden of proof against his employer for injuries sustained from an assault made upon him by another employee, unless, at the time of the assault, the assaulter was acting in the course of the discharge of his duties and in furtherance of the work of his employer's business.

There is not a scintilla of evidence in the record that the assailant, Nezbeth, was within the scope of his employment and, in addition, acting in the furtherance of the work of his employer's business. The record leaves no conclusion but that the assaulter was on a venture of his own and, in a burst of temper, he acted in such a manner so as to actually impede and hinder the progress of his employer's business.

The substantive questions of law are controlled by Federal Law and particularly by the Federal Decisions under the Federal Employers' Liability Act.

There can be no question that a recovery of an employee against a railroad company under the Federal Employers' Liability Act must rest on negligence. With this understanding of the scope of the Federal Employers' Lia-

bility Act, the Respondent, The New York Central Railroad Company, now proceeds to a discussion of the authorities which it claims clearly controls the judgment in this case.

GROUNDS FOR NOT GRANTING THE WRIT OF CERTIORARI.

It is respectfully submitted that it would be improvident to grant a writ of certiorari in this case since: (a) there is no important question of federal law involved herein, and (b) there are no public issues presented.

For many years the decisions of this Court and other courts have established the law in this area of the F. E. L. A. It may be summarized as follows:

An employee of a railroad company has no cause of action against his employer under the Federal Employers' Liability Act, 45 U. S. C. A. Section 51 et seq., for injuries sustained from an assault made upon an employee by another employee, unless a the time of the assault, the assaulter was acting in the course of the discharge of his duties, and in the furtherance of the work of his employer.

The trial court so held, and the Court of Appeals for the 8th Judicial District of Ohio also held accordingly. Upon presentation to the Supreme Court of Ohio, the petitioner was unable to establish an issue of great and general public interest.

The decisions of this Court, the several Circuit Courts and the District Courts, together with the decisions of the several State Courts, uniformly hold that under the Federal Employers' Liability Act unprovoked intentional torts committed by one employee upon another are not actionable without proof that the act was committed within the scope of the employment and in the furtherance of the carrier's business. The petitioner here has not attempted.

to meet this test, and recognized in the trial court his failure to prove either of the two essential elements; namely that the act was committed within the scope of the employment and that the act was committed in the furtherance of the master's business. Whereupon, the trial court arrested the case and entered judgment for the Respondent at the close of Petitioner's case.

The trial court determined that it was bound by *stare decisis* and followed *Young v. NYC R. R. Co.*, 88 Ohio App. 352 (1949), certiorari denied 339 U. S. 986; 94 L. ed. 1388 (1950) and the cases cited therein.

In *Young v. New York Central Railroad Company*, 88 Ohio Appellate, 352, Certiorari denied, 339 U. S. 986, 94 L. Ed. 1388 (1949), the Court of Appeals for Cuyahoga County affirmed the directed verdict and judgment of the Court of Common Pleas.

Young, a railroad signalman, brought his action under the Federal Employers' Liability Act against his employer for damages for injuries sustained as a result of an unprovoked attack made by a fellow worker. The complaint claimed that the defendant was negligent in retaining in its employ, a dangerous and vicious man, with knowledge of these propensities and characteristics and *failing to provide the plaintiff with a safe place to work.* (Emphasis ours.)

The opinion graphically describes the incident complained of and the prior history of altercations in which the assaulting employee was involved. The assaulting employee had made seven or eight serious, malicious and unprovoked attacks upon fellow employees *and these prior attacks were known to the dispatcher and superintendent.* And, it was assumed by the court, that notice of such incidents created knowledge on the part of the employer.

Young, a man of 50, having 31-years service, was a

tower operator at the C. & P. crossing in Cleveland, Ohio, working from 11:00 P. M. until 7:00 A. M. He reported to his shanty, near the crossing. He relieved Johnson, the assaulter, who was the lever man on the prior shift to Young's.

Prior to the night of the assault, Young only casually knew Johnson. They had had no physical encounters, words or trouble during the year, except one instance, in which Young was 45 minutes late and another instance when he was about one minute late.

On the night of the assault, Young was four minutes late reporting for work. Young had paid Johnson sixty cents to compensate him for overtime on the night Young was 45 minutes late, and otherwise had had no trouble and got along well.

On the night of the assault, Young had a flat tire on his way to work, and arrived about four minutes after 11 P. M. He had apologized to Johnson for his lateness, and explained that he had had trouble with his automobile.

He proceeded to the shanty with Johnson following him. As Young took off his jacket, Johnson shouted "I warned you not to come late * * * hurry up now, get to work." Johnson reached for plaintiff's jacket and appeared to be attempting to pull it off. What appeared to be mere jerking of the plaintiff's jacket, was repeated stab wounds in his chest and abdomen. In the struggle which ensued, plaintiff was severely cut and stabbed in the chest, abdomen and legs. Young was able to save his life by striking Johnson several blows with a stove poker, thereafter escaping from the shanty and calling a nearby Pennsylvania Railroad crew for help. Plaintiff was hospitalized under oxygen and underwent two operations. He remained in the hospital for one month and was beridden at home another month.

At the close of all the evidence, the trial court granted the defendant railroad's motion for a directed verdict and rendered a judgment thereon, whereupon a motion for a new trial having been overruled, and appeal on questions of law was perfected to the Court of Appeals for Cuyahoga County.

In affirming the judgment of the Common Pleas Court, Judge Hurd said at page 357;

> *"Cases involving circumstances similar to those of the instant case have heretofore been considered and decided by the Federal Courts and the interpretations placed upon the Federal Employers' Liability Act by such decisions must be followed by this court in the instant case so far as they are applicable."*

The Court of Appeals in the opinion in *Young v. NYC R. R. Co., supra*, discussed the "safe place to work" concept advanced on the plaintiff there and again presented in the case at bar. This concept was rejected as not applicable upon the decisions of this Court.

The particular hazards, the dangers inherent in the peculiar situation and the foreseeable risk of harm readily distinguish the *Young* case, *supra*, and the case at bar from *Lillie v. Thompson, Trustee*, 332 U. S. 549, 92 L. ed. 73, 68 Sup Ct. 140 (1947).

The Court considered the opinions of this Court in *Davis v. Green*, 260 U. S. 349, 67 L. ed. 299; 43 S. Ct. 123 (1922); *St. L. S. F. Ry. Co. v. Mills, Admx.*, 271 U. S. 344, 70 L. ed. 979, 46 S. Ct. 520 (1926); *Atlantic & Charlotte Airline Rd. Co. v. Green*, 279 U. S. 821, 73 L. ed. 976, 49 S. Ct. 350. The Court further considered *In re Southern Pacific Co.*, 30 F. (2d) 723 (1928), affirmed by the Court of Appeals 2nd Circuit 30 F. (2d) 725 (1929); *Lykes Bros. Steamship Co., Inc. v. Grubaugh*, 128 F. (2d) 387, CCA 5th; *Brailas v. Shepard Steamship Co.*, 152 F. (2d) 849.

CCA 2nd (1945); *The George Vickers, Cable v. U. S. A.*, 77 F. Supp. 515 (1947), modified on other grounds 169 F. (2d) 90 (1948); *Sheaf v. Minneapolis, St. P. & S. S. M. R. Co.*, 162 F. (2d) 110, CCA 8th (1947); *Smith v. Lehigh Valley Ry. Co.* 174 F. (2d) 592 CCA 2nd (1949). *The Smith* case, *supra*, was heard before Augustus N. Hand, Chase, and Clark, Circuit Judges. The Circuit Court held that the employee (appellant) who sued under the Federal Employers' Liability Act to recover for the intentional tort of assault and battery occasioned by a fellow employee, failed to sustain his burden of proof. Plaintiff there was carrying mail to sleeping cars and was on a platform built between a sleeping car and an unused dining car which was the last car next to another dining car then in use. The cook in charge of the dining car was the superior of the injured man Smith. The cook pushed or shoved another man, a laborer employed by the railroad, out of the unused dining car on to the platform where Smith was standing. The laborer resisted the cook and in the melee the cook suddenly pushed Smith off the platform and engaged in a fist fight with the laborer. Smith was injured when he fell to the ground after being pushed by the cook. Trial Court had submitted the issues to a jury and set aside a general verdict by granting a motion for judgment n.o.v. This was reviewed by the Circuit Court which followed the doctrines enunciated above stating, "The plaintiff had the burden of showing that the cook's negligence occurred in the course of his employment." (at 594.) Having failed to substantiate this burden, the judgment could not stand.

In the case at bar, the petitioner recognizes that he failed to sustain this burden.

The Supreme Court of Montana in an F. E. L. A. case followed the doctrines announced by this Court, the sev-

eral Circuit Courts, District Courts and State Courts, and held in *Amann v. Northern Pacific Railway Co.*, 272 P. (2d) 753 (1955), re-hearing denied 1956, that no cause of action under the Federal Employers' Liability Act is stated for the intentional tort of assault and battery by one employee upon another unless the pleadings show that the assaulting employee by engaging in the altercation was carrying out his assigned duties or that he was engaged in the performance of a task that he was employed to perform. In the *Amann* case, Amann, a foreman, was discharged when the assaulting employee continued his employment. The opinion of Chief Justice Adair gives careful attention to each of the many cases comprising the federal body of law relating to assault and battery by one employee of a railroad upon another under the Federal Employers' Liability Act. The Court held that under the Federal Employers' Liability Act the decisions uniformly require that the plaintiff show that the assaulter was acting in the scope of his employment and in the furtherance of his master's business at the time, place and occasion which precipitated the encounter in which the plaintiff was injured.

In *Ochsrider v. Reading Co.*, 172 F. Supp. 830 (1959), a welder in a railroad car shop was approached by a fellow employee who complained that plaintiff's work was progressing slowly, whereupon plaintiff attempted to placate the fellow employee. The plaintiff was assaulted and described the assault as follows: "* * * he came upright and started in swinging, clubbed me all over the face and teeth and jaw, I don't know how many times he hit me, and my glasses fell to the floor * * *." The District Court for the Eastern District of Pennsylvania followed the body of law as enunciated by this Court and others relating to intentional torts under the Federal Employers' Liability

Act and found "as the statute has been construed, 'negligence' may embrace an assault and battery, and the employer must respond if it was committed by an employee in the scope of his employment with the purpose of furthering the employers' business." The Court held that the evidence established that the assaulting employee did a wilful act wholly outside the scope of his employment intended only to further his own interests. Therefore the defendant railroad was not liable.

CONCLUSION.

The comment of Judge Hurd in *Young v. N. Y. C. R. R. Co.*, 88 Ohio App. 352 (1948), is appropriate to the case now before this Court, particularly so since the *Young* case was the precedent followed by the trial judge in the case at bar. Judge Hurd states "* * * Cases involving circumstances similar to those of the instant case have heretofore been considered and decided by the Federal Courts and the interpretation placed upon the Federal Employers' Liability Act by such decisions must be followed * * *." We submit the Trial Court herein, the Court of Appeals of the 8th Judicial District of Ohio and the Supreme Court of Ohio have without dissent agreed that the law as developed by this Court and other Federal Courts relating to assault and battery under the Federal Employers' Liability Act dictates the results arrived at by the Trial Judge herein.

The theory of the Petitioner regarding a safe place to work is neither an original nor a new concept in the law of intentional tort under the F. E. L. A., as the safe place to work doctrine was necessarily involved in each case cited by the respondent.

We respectfully submit that it would be improvident to grant a writ of certiorari in the case at bar.

Respectfully submitted,

JOHN F. DOLAN,

Attorney for Respondent.

APPENDIX A.

RULING OF THE COURT OF COMMON PLEAS.

The Court: Gentlemen of counsel, in the relatively brief time that was allotted to me for consideration of defendant's motion, which I take in its entirety is a motion to arrest the case and the evidence from the jury and enter judgment for the defendant—is that correct, Mr. Ryan?

Mr. Ryan: Yes, your Honor.

The Court: I have given the subject paintaking consideration. I have read and reread the *Young* case, from the Court of Appeals of Cuyahoga County, and the *Tatham* cases from Illinois, which was not cited but which is reported in ALR, Second, Volume 33, at page 1287, and it is found in the annotations, in which all of the leading cases are reviewed.

I have also examined a very informative article in 17 Ohio State Law Journal on what is a safe place to work. There, again, a number of cases are analyzed and referred to.

Counsel for the plaintiff in answer to my question yesterday conceded that this Court is bound by the decision of the Court of Appeals of Cuyahoga County, unless the Court should be able to distinguish that case.

The Court has made strenuous efforts to find some basis for distinguishing the *Young* case from the instant case, and I am rather sad to acknowledge that the Court has failed in that effort.

This plaintiff suffered a grievous injury. The Court has been impressed by his total lack of fear, and his honesty as a witness, and it has been impressed, too, by his intelligence.

The Court believes that Mr. Moreno represents an ideal type of workman, conscientious, does his work, loyal

to his employer, faithful to any task that is assigned to him.

Of course, you gentlemen realize that this motion has to be decided on the basis of the law as the Court finds the law to be or understands it to be, and my sympathy for Mr. Moreno cannot be an influence in that connection.

The plaintiff made clear to the Court yesterday in oral argument that he places no reliance upon the theory that the defendant should be held answerable for Mr. Moreno's injury on the principles obtaining under the rule of respondeat superior.

If that were the theory of the plaintiff, it would be appropriate for the Court to consider whether Mr. Nezbeth's acts were within the scope of his employment and in furtherance of the employer's business.

From the statements of counsel for the plaintiff it is crystal clear that this is an action based upon an alleged direct negligence of the employer.

The employer is alleged to have been negligent in not providing a foreman at Linndale Yard on the morning of November 26, 1954, who if present on the scene might have discovered Mr. Nezbeth's condition before he struck Mr. Moreno, and might have relieved him from duty.

There is no evidence that the defendant, through Mr. Kelley or any other agent, had any knowledge that Mr. Nezbeth had been drinking before he came to work, or that he went off the job and indulged in more drinking.

There is no evidence that the defendant through any of its agents had any knowledge that Mr. Nezbeth was accustomed to appear for and be at work under the influence of intoxicating liquor.

The evidence is that among his fellow-workers he had the reputation of sometimes—I think Mr. Moreno's exact

words were "from time to time"—Nezbeth would be on the job under the influence of liquor, and at such times—otherwise a fine, congenial gentleman—he would be a rough, vicious person.

Mr. Moreno did not say that he ever communicated that intelligence, such as he had, and there is no evidence that Mr. Moreno knew of the separate incidents which contributed to that reputation. He just knew that that was the reputation.

The Court is fully aware of the fact that the reviewing courts frown upon directed verdicts in F. E. L. A. cases; to say the least, they do not encourage them.

But this Court perceives that it is its duty to rule on this motion in accordance with its understanding of the law, without fear what the reviewing courts may ultimately do in this matter, and I hope it goes to the reviewing courts because I would like to see the decision I am about to give tested.

In the opinion of the Court the evidence fails to support the contention of the plaintiff that the New York Central Railroad was negligent in any respect.

On the authority of *Young versus New York Central Railroad*, 88 Ohio Appellate, page 352, the motion is granted and exception is saved to the plaintiff.

* * * * *